LEE WAH LOY

v.

NG WENG FOOK

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[ORIGINATING SUMMONS NO. 54 OF 1980]
18 OCTOBER 1983

CIVIL PROCEDURE: *Application to vary consent order made in respect of a probate matter - Counter-application to set aside consent order - Different procedure to be followed for final and interlocutory orders - Test to be applied in determining a final order - Courts of Judicature Act 1964, s. 68(1)(b).*

The applicants were the beneficiaries of the estate of the deceased. The respondent was the sole administrator of the estate. A consent order was made on 2 March 1981 in respect of an application by way of originating summons by the applicants against the respondent for several reliefs in connection with the administration of the estate (hereinafter referred to as the '1981 Order'). The respondent was represented by another solicitor at that time. Another Consent order was made on 7 June 1982 between the same parties in respect of another application by the applicants (hereinafter referred to as the '1982 consent Order'). The applicants have now made another application to vary the terms of the 1982 Consent Order (hereinafter referred to as the applicants' application). Upon retaining the present solicitor, the respondent filed an application to set aside the '1982 Consent Order'.

Held:

[1] The 1982 consent order was a final order in respect of the relief sought for in that application. The determining test is whether the order in question leaves any further thing to be done so as to allow the matter in dispute to go on for further hearing if not, the order disposes of the rights of the parties.

[2] A consent order, when it is a final order, can only be set aside in a separate action brought for the purpose. A consent order, when it is an interlocutory matter, can be set aside in the same pleadings in which it was made.

[Counter-application by respondent to set aside 1982 Consent Order dismissed. Applicants' application to vary 1982 Consent Order dismissed. Each party to bear its own costs.]

Cases referred to:
Ainsworth v. Wilding [1896] 1 Ch Div 673
United Overseas Bank Ltd. v. Joo Hin Leong [1978] 2 MLJ 202
Mullins v. Howell [1879] 11 Ch Div 763
B v. B [1970] 1 All ER 913
Purcell v. F.C. Trigell [1970] 3 All ER 673
Bozson v. Altrincham Urban District Council [1903] 1 KB 547
Salaman v. Warner and Others [1891] 1 QB 734
Fritz v. Hobson [1880] 14 Ch Div 542

Legislation referred to:
Courts of Judicature Act 1964, s. 68(1)(b)
Rules of Supreme Court 1883 [UK], O. XXVIII r. 11

Other source referred to:
Halsbury's Laws of England, 4th edn., vol. 26, p. 286

For the applicants - A.K.J. D'Cruz; M/s. A.K.J. D'Cruz & Co.
For the respondent - N. Ramachandran; M/s. N. Ramachandran & Co.

JUDGMENT

Peh Swee Chin J:

The applicants, claiming as beneficiaries of the estate of the deceased concerned in this matter, took out the originating summons herein for several reliefs against the respondent, the then sole administrator of the said estate in connection with the administration of the estate. On 2 March 1981, this matter came up for hearing, and by consent, an order was made in terms of application, (hereinafter called the 1981 Order). The respondent was represented by solicitors (not the present solicitors), so were the applicants.

Subsequent to the 1981 Order, the applicants further took out a summons-in-chambers dated 9 April 1982 (Encl. 13) which came up for hearing on 7 June 1982 and by consent, an order was further made in terms as follows:

1. The 3rd applicant, Ng Kum Fah be and is hereby appointed as the co-administrator of the estate of Ng Foon How @ Ng Ah Lian @ Ng Fon How.
2. The land held under E.M.R. 86 for Lot 598 in the Mukim Jelei, Bahau measuring 4a. 2r. 35p. belonging to the estate of the deceased be sold at a minimum price of RM40,000 (Ringgit Forty Thousand only) per acre without vacant possession subject to any higher offer by public tender failing which by private treaty.
3. The valuation, advertisement fees and other incidentals incurred in the sale of land referred to in 2 herein be paid out of the proceeds of the sale.

I shall hereafter refer to this order as the 1982 Consent Order. Yet again, the applicants took out a second summons-in-chambers dated 12 March 1983 (Encl. 21) asking for the following:

1. That leave be granted to the applicants to sell all that land held under E.M.R. 86 for Lot 598 in the Mukim of Jelai, Bahau, measuring 4a. 2r. 35p. at the price of RM130,000 (Ringgit One Hundred and Thirty Thousand only) without vacant possession;
2. That the respondent do execute all the necessary documents to effect the transfer of the said land to the intended purchaser, his nominee or nominees;
3. That the respondent do produce accounts of profits accrued from the land in question from 1 January 1980, till date of rendering all accounts;
4. That the sum of RM42,000 (Ringgit forty-two thousand only) due from the respondent to the applicants in terms of the prayer in enclosure 12 of the file in the Registry of the High Court in Seremban in connection with this matter be deducted from the share of the proceeds of sale due to the respondent;
5. That the respondent do pay the costs of this application and the whole of the proceedings herein.

I shall hereafter refer to this second summons-in-chambers as the applicants' application.

At about this time, the respondent appointed the present solicitors in place of the former solicitors, and filed through his new solicitors, a counter summons-in-chambers dated 12 May 1983 (Encl. 24) asking, in effect, for an order that the 1982 Consent Order be set aside. I shall refer to this applicant as respondent's application hereafter. Both parties have filed written submissions on both applications.

The 1982 Consent Order is attacked on a large number of legal grounds, in addition to an affidavit of the respondent filed in support of the respondent's application and sworn to on 11 May 1983. The substance of this affidavit is, *inter alia*, the denial (for the first time) of the applicants as beneficiaries of the estate of the deceased; mistake on the part of his former solicitors and also of his son who gave instructions on behalf of the respondent to his former solicitors before the 1982 Consent Order was made.

By far, in my view, the most onerous burden on the respondent's Counsel would be to persuade this Court that a consent order like the 1982 Consent Order can be set aside by the Court. It is settled that a consent order cannot be set aside once it has been passed and entered except by means of a fresh action brought for the purpose. See the case of *Ainsworth v. Wilding* [1986] 1 Ch Div 673 which has always been followed and approved. See also *United Overseas Bank Ltd. v. Joo Hin Leong* [1978] 2 MLJ 202, a recent case which again gave its stamp of approval to *Ainsworth is* case. In *Ainsworth* is case, the applicant for setting aside the consent order therein had relied also on the ground of mistake as the respondent in the instant case has so relied. It was held that a consent judgment, after it had been passed and entered could not be set aside otherwise than in a fresh action brought for that purpose unless there was an accidental slip or clerical error within, or under, the English Rules of Supreme Court, 1883, i.e. O. XXVIII r. 11, or the judgment as drawn up did not correctly specify what the Court actually decided or intended to decide. Further such a consent order which has been passed and entered, is binding on parties to it until it is set aside in a separate action filed for that purpose. It is not event appealable under s. 68(1)(b) of the Courts of Judicature Act 1964.

However, learned Counsel for respondent submits that a consent order though it has been passed and entered, can be still set aside in the same proceedings without filing a separate suit when such perfected consent order is an interlocutory order, and not a final order. Learned Counsel for the applicants has not really contended to the contrary on this particular argument. Counsel relies on two cases noted in page 286 of Vol. 26 of *Halsbury's Laws of England*, 4th Edn. namely *Mullins v. Howell* [1879] 11 Ch Div 763 and *B v. B* [1970] 1 All ER 913.

In *Mullins v. Howell*, a consent order for a mandatory injunction was made. It appears that the defendant therein had consented, by mistake, to a more extensive undertaking than he intended to do. The defendant then moved the Court for so much of the consent order as related to such mistake be discharged. The plaintiff then, on the other hand, also moved the Court to compel the defendant to perform his undertaking in the order. Jessel, MR after hearing Counsel's argument, declined in fact, both to discharge the former consent order or to attach the defendant therein. He then made the following observation:

> I have no doubt that the Court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under mistake, though that mistake was on one side only, the Court having a sort of general control over orders made on interlocutory applications.

In *B v. B (supra)*, the husband applied for variation of maintenance orders made by consent, on the ground of his mistake as to the amounts of his income tax liability. Ormrod J approved and applied the dictum of Jessell, MR quoted above, when he varied the consent order for maintenance.

In *Purcell v. F.C. Trigell* [1970] 3 All ER 673 a Court of Appeal decision, in which Lord Denning considered and apparently approved the same dictum. Lord Denning said at page 675 as follows:

> The Court has always a control over interlocutory orders. It may, in its discretion, vary or alter them even though made originally by consent.

I have some doubt as to whether the dictum of Jessel, MR was or was not made obiter. It was however approved by two subsequent cases mentioned above, the last of which being a decision of Court of Appeal, a decision for which I cannot have scant regard. I therefore also hold, that a consent order, when it is an interlocutory order as well, can be set aside in the same pleadings in which it was made, unlike a consent order which, when it is also a final order, can only be set aside in a separate action brought for the purpose. This, however, does not conclude the matter between the parties hereto as another problem emerges as to whether the 1982 Consent Order is or is not an interlocutory order.

Learned Counsel for the respondent submits that the 1982 Consent Order does not finally dispose of the rights of the parties, because to quote:

> ... who gets what and in what proportion out of the assets of the deceased is not stated and furthermore no reference is made to the other properties of the deceased.

It is not always easy to distinguish between a final order and interlocutory order. Counsel's submission appears to rest on the test mentioned by Lord Alverstone CJ in *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547. For implementing this test a preliminary test would be obviously necessary, in my view. The preliminary test is whether the order in question leaves any further thing to be done so as to allow the matter in dispute to go on for further hearing if not, the order disposes of the rights of the parties. Please see *Salaman v. Warner and Others* [1891] 1 QB 734. Before applying any such test, we must ascertain as to what were the rights of the parties that were sought to be disposed of. For this purpose it is legitimate to look at the prayers or claims of the summons-in-chambers on which the 1982 Consent Order was made. Applying Lord Alverstone's test and its preliminary test, the 1982 Consent Order appears to have disposed of all the prayers or claims as set out in the summons-in-chambers on which it was made. In my judgment, disposing of all such prayers on claims would be tantamount to disposing of the rights of the parties as far as the 1982 Consent Order is concerned, an order which is sought to have set aside. Nothing short of this proposition would make sense out of Lord Alverstone's test. Counsel's laconic submission on this point of interlocutory order quoted above, in my view, is more apparently than really correct. The 1982 Consent Order need not state as to who gets what and in what proportion as to other properties. These matters were not disputed rights between the parties in the summons-in-chambers on which the 1982 Consent Order was made.

It therefore becomes, in consequence, unnecessary to refer to other very detailed and careful arguments on the grounds as to why the 1982 Consent Order ought to be set aside. Of course these arguments can prove to be very interesting in a separate action filed for the purpose of setting aside the 1982 Consent Order. I now turn to the applicants' application.

I will only refer to such parts of Counsel's submission as are relevant for my consideration. Counsel for the respondent submits that the 1981 Order was final order so that the 1982 Consent Order could not have been validly made on a subsequent summons-in-chambers, seeking an entirely new order or new directions and reliefs. I would not consider this submission as regards the 1982 Consent Order, which, I have just concluded, cannot be set aside herein but in fairness to Counsel, I would have to consider it *vis-a-vis* the present applicants' application and the 1982 Consent Order as learned Counsel appears to oppose the present applicants' application on similar ground.

The 1982 Consent Order does not contain an express provision for liberty to apply. In my view, liberty to apply, is implied in every order of Court without its being expressly reserved. This is *Fritz v. Hobson* [1880] 14 Ch Div 542 and 562, Fry J. held, to quote:

> ... all orders of the Court carry with them *in gremio* liberty to apply.

However, I agree with Counsel that liberty to apply does not confer right to vary a final order or to new orders as they do not arise out of the working out of the final order. Looking at the prayers of applicants' application, prayers (1), (2) and (4) in effect seek to vary paragraphs 2 and 3 of the 1982 Consent Order. Without the consent of the respondent they cannot, in my view, be entertained and the applicants would have to fall back on the 1982 Consent Order. Prayer (3) seeks accounts in respect of the said land from 1 January, 1980 and it represents the seeking of a new order, in the circumstances, it cannot also be entertained.

In the result, I dismiss, both the applications of the applicants and the respondent dated 12 March 1983 and 12 May 1983 respectively and further order that each party bear its own costs.

Also found at [1984] 1 CLJ 97